**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 32**

(Hayward, California)

NEW YORK TRANSIT, INC.,

Employer,

and

TEAMSTERS LOCAL 78, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner.

Case 32-RC-4913

## DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, including the parties' briefs and arguments made at the hearing, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in the business of warehousing and shipping shoes. During the previous twelve months, the Employer has purchased products valued in excess of $50,000 directly from vendors located outside the State of California. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate

the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. Petitioner seeks to represent a unit, herein called the Unit, consisting of all full time and regular part time employees at the Hayward facility, excluding temporary employees supplied by a temporary agency, office clerical employees, guards and supervisors as defined under the Act. A question affecting commerce exists concerning the representation of certain of these employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer contends that those individuals occupying the job classifications of assistant warehouse manager and warehouse supervisor are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the unit.

6. Contrary to the Employer, the Petitioner contends that at least one individual with the job title assistant warehouse manager and the individual with the job title warehouse supervisor are not supervisors within the meaning of Section 2(11) of the Act, and that these individuals should be included in the unit.

THE FACTS

The Employer operates a warehouse facility in Hayward, California where it is engaged in the business of receiving, warehousing and shipping shoes.

James Rose is the chief operating officer, Jerry Parsons is the warehouse manager and Sally Stein is the Personnel Director. The parties stipulate that these individuals are excluded from the Unit.

Robert Castro holds the title of warehouse supervisor. Patrick Egu holds the title of

assistant warehouse manager. A third individual, Sean Lawrence, was recently hired with the title of assistant warehouse manager as well. The supervisory status of these three individuals is in dispute. The facility also employs people with the following job titles: warehouse associate, order processing clerk and order processing lead. The parties stipulate that employees with these job titles are all in the Unit. The facility often has need for temporary workers to assist the permanent employees. These workers are procured through a temporary agency and will work for varying time periods, often of a week or more. There are commonly between 2 and 12 temporary employees working at the facility alongside the regular employees.

Employees work from 8 to 4:30 or 5:00, depending on whether they choose to take a half hour or a full hour lunch break. Parson arrives at 8:30, a half-hour after the employees. The facility is a warehouse with two docks. Containers full of shoes arrive at the facility daily from the Port of Oakland. Unloading the containers is priority work; every container that arrives must be unloaded that same day, often requiring individuals to stay after the regular close of business at 5:00 p.m. The product is placed in the warehouse and the location recorded into the computerized inventory system. Orders for shoes arrive throughout the day. Office staff receive the orders for shoes and generate a "pick list" to guide employees in filling the order. The orders are usually placed on a table in the warehouse. Employees check the table when they have finished a task and then select an order to fill. Employees fill the orders from the inventory and load the orders onto various delivery trucks when they arrive. Some orders have a high priority and take precedent over other orders.

Generally, employees choose which order to pick and proceed independently to fill the order. Occasionally, employees are directed to work on a particular order, usually when a high-priority order comes in. Temporary employees are more likely than permanent employees to

receive direction. Occasionally, employees are directed to cease filling an order so that they may assist in unloading a container or to fill a higher-priority order.

Workers staying after 5:00 p.m. are paid time and a half overtime. Egu and Castro, but not Lawrence, receive overtime pay as well. Infrequently the need arises for employees to work on a Saturday. In those cases, the employees are also paid overtime.

Parsons had surgery in February, 2001 and was away from the facility for approximately two months. Parsons has also been out for various medical appointments on numerous occasions in 2001. During this time, Patrick Egu, and to a lesser extent Robert Castro, took over some of Parsons' duties, including procuring temporary employees, signing time sheets and making some decisions regarding overtime work. When Egu and Castro were taking over some of Parsons' duties, however, things did not run smoothly at the warehouse. Sean Lawrence was recently hired in part because the Employer was dissatisfied with the way the warehouse operated during Parsons' absences. Lawrence is being trained to assume Parsons' duties in the future.

During the regular course of business, that is when Parsons is present, Castro and Egu primarily work on the floor alongside the employees stipulated in the Unit.

Lawrence has been classified by the Employer an exempt employee. At the time of the hearing, Lawrence was receiving training. Although he was working on the warehouse floor at the time, the Employer stated that Lawrence was hired because of his management experience and computer skills. He will soon be taking on more management functions and will not be working on the floor in the future.

POSITIONS OF THE PARTIES

As noted, the Petitioner seeks to represent a bargaining unit consisting of all full time and regular part time employees at the Hayward, California, facility, excluding office clerical

employees, guards and supervisors as defined under the Act. The parties have stipulated to the exclusion of temporary employees from the unit. The parties initially stipulated to the exclusion of Sean Lawrence, a newly hired assistant warehouse manager. The Union withdrew its stipulation during the hearing. In its brief, the Union states that it takes no position on Lawrence's status but believes that the evidence points towards excluding him from the unit.

The Employer contends that the two individuals holding the title of assistant warehouse manager and the one individual holding the title warehouse supervisor must be excluded from the Unit because they are statutory supervisors. The Petitioner contends that the warehouse supervisor and assistant warehouse manager Patrick Egu lack the indicia of supervisory status under Section 2(11) of the Act and must be included in the Unit and, therefore, permitted to vote in any future election. The Union has disclaimed interest in representing a unit other than the one sought.

ANALYSIS

The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *NLRB v. Kentucky River Community Care,* 532 U.S. __ , 121 S.Ct. 1861 (2001); *Bennett Industries, Inc.,* 313 NLRB 1363 (1994); *Tuscon Gas and Electric Co.,* 241 NLRB 181, 181 (1979). Section 2(11) of the Act defines a supervisor as one who possesses "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." The possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to establish supervisory status, provided that such authority is

exercised in the employer's interest, and requires independent judgment in a manner which is more than routine or clerical. *Harborside Healthcare, Inc.,* 330 NLRB No. 191 (2000); *Hydro Conduit Corp.,* 254 NLRB 433, 437 (1981). The exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner, however, does not confer supervisory status on employees. *Chicago Metallic Corp.,* 273 NLRB 1677, 1689 (1985); *Advanced Mining Group,* 260 NLRB 486, 507 (1982).

Because supervisory status removes individuals from some of the protections of the Act, only those personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." S.Rep.No. 105, 80th Cong. 1 Sec. 4 (1947); *Ten Broeck Commons*, 320 NLRB, 806, 809 (1996). Furthermore, the Board directs that supervisory status not be found "whenever the evidence is in conflict or otherwise inconclusive on a particular indicia." *Phelps Community Medical Center*, 295 NLRB 486 (1989).

In the instant matter, I find that the Employer, who has raised the contention, has failed to satisfy its burden of proving the supervisory status of Patrick Egu and Robert Castro. Because the evidence regarding Lawrence was inconclusive and inchoate, I find that it is insufficient to make a determination of his status at this point and direct that he vote under challenge.

Substitution for Manager Jerry Parsons

The Employer presented evidence regarding the duties assumed by Egu and Castro during Parsons' absence. "[T]he appropriate test for determining the status of employees who substitute for supervisors is whether the part-time supervisors spend a regular and substantial portion of their working time performing supervisory tasks." *Aladdin Hotel*, 270 NLRB 838, 840 (1984). Sporadic substitutions are insufficient. The evidence establishes that Egu and

Castro substituted for Parsons only when Parsons was absent for sick leave or vacation.

In *St. Francis Medical Center-West*, 323 NLRB 1046 (1997), the Board disregarded a five-month period of substitution by an employee for a supervisor in evaluating this employee's supervisory status. The Board found that the substitution, caused as here by the need to fill in for a supervisor on a lengthy medical leave, was caused by extraordinary circumstances and unlikely to reoccur. Accordingly, the Board found that the employee at issue could not be considered a supervisor on the basis of duties performed while substituting for the regular supervisor. Because the circumstances in this case parallel the circumstances in *St. Francis Medical Center-West*, I find that Egu and Castro's temporary assumption of some of Parsons duties was sporadic and not likely to reoccur, especially in light of the fact that Lawrence has been hired to substitute for Parsons in the future. Without determining whether any of the duties assumed by Egu and Castro were indeed supervisory in nature, I find that any supervisory actions taken by Egu and Castro during Parsons' absences cannot form the basis of establishing supervisory status. Rather, the analysis of their supervisory status must be based on a review of their regular duties. *St. Francis Medical Center-West,* 323 NLRB at 1074.

Assignment and Responsible Direction of Work

The evidence establishes that Egu and Castro work side by side with the unit members during the majority of their work day, performing the same work as the unit members. There was some conflict in the testimony regarding the extent to which the Egu and Castro assign and direct the work of others. However, even viewing the evidence in the light most favorable to the Employer, the evidence does not establish that Egu and Castro's role in the assignment of work reached the level of responsibly directing work.

The evidence establishes that Egu and Castro engaged in maintaining the status quo

rather than exercising independent judgment in the assignment of work. This type of decision making – such as notifying workers that a container has arrived or asking an employee to help fill a priority order - represents "routine decisions typical of leadman positions." *S.D.I. Operating Partners, L.P., Harding Glass Division*, 321 NLRB 111, 111 (1996).

Egu and Castro are empowered to make temporary position assignment changes on the warehouse floor in order to facilitate the warehouse's needs. For example, Egu might make an announcement that a container has arrived and request employees to come and unload it. Occasionally, Egu or Castro might receive a priority order from the office staff and request an employee to switch over from working on a low-priority order to working on the high-priority one. If Egu or Castro observe an employee who is not busy, he might suggest an appropriate order for him to fill. These assignments are determined in a routine manner. There is no discretion involved on the part of Egu or Castro in ascertaining which tasks have priority. Rather, it is clear company policy that unloading containers is the top priority, followed by filling high-priority orders.

Even if Egu and Castro have the authority to reassign employees from one task to another, the Board has found that "responsibility for planning or designing a project, which may involve determining such matters as the appropriate staffing, materials, and schedule, must be distinguished from the exercise of authority and independent judgment in the role of assigning and directing employees in the accomplishment of the work." *S.D.I. Operating Partners, supra.* The record supports a finding that Egu and Castro's responsibilities constitute merely assuring appropriate staffing, rather than that of directing employees.

The evidence shows that Egu and Castro are responsible for training employees, occasionally directing them to engage in high priority work and monitoring the overall efficiency

of the facility. These duties are consistent with their role as more experienced employees and do not indicate supervisory authority. The Board has long recognized that some more skilled employees whose primary function is participation in the operating processes of a facility who incidentally direct the movement or operations of less skilled subordinate employees, nevertheless are not supervisors because their authority is based on their working skills and experience. *Ten Broeck Commons*, 320 NLRB at 808-809. At issue here is whether the direction the Egu and Castro provide requires independent judgment or whether the directions are merely routine. Id. I find, consistent with the Board's precedent, that the duties performed by Egu and Castro as evidenced in the record do not require independent judgment as required by Section 2(11), but are instead performed in a routine and perfunctory manner. Id. at 811. See also *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994).

I find, therefore, that the Employer has failed to demonstrate that Egu or Castro assign or responsibly direct warehouse associates or other employees.

Effective Recommendation of Discipline

The Employer contends that Egu and Castro have the authority to discipline employees. According to the Employer, the two have had this authority since around the time Castro was promoted to warehouse supervisor two years ago. After Castro's promotion, Parsons held a meeting with the employees to let them know that they should listen to Castro and that Castro and Egu had the authority to discipline them. Merely informing employees that an individual is a supervisor, however, does not in fact establish that individual is a supervisor if actual authority is lacking. *Polynesian Hospital Tours*, 297 NLRB 228 (1989). The Employer did not explain why Egu only became authorized to discipline employees two years ago, despite the fact that he has been "assistant warehouse manager" for eight years.

The Employer provided only scant evidence that Egu or Castro have ever actually exercised the authority to discipline employees. It appears that Egu and Castro generally report any difficulties to Parsons for him to handle. The Employer has pointed to three instances in which Egu or Castro allegedly engaged in the discipline of employees. The Employer also contends that the fact that the authority has not been frequently exercised does not establish that the individuals do not in fact possess the authority.

Although Egu and Castro have been informed that they can issue written warnings, neither has received any training as to how to perform discipline. They were not shown where the warning forms are located nor advised how to fill them out. There was no evidence that Egu or Castro's limited involvement with discipline has ever led to any change in employees' wages or any other term or condition of their employment. Furthermore, the evidence shows that in the three instances cited by the Employer in which Egu or Castro recommended disciplining an employee, their recommendations were independently investigated, and, in two of the circumstances, rejected by the Employer.

Castro was involved in the disciplinary write-up of Anthony Castillo in around October, 2000. The evidence shows that Parsons had extensive involvement in effectuating the discipline. Castro conferred with Parsons before issuing the discipline and Parsons conducted an independent investigation of Castillo's performance. Castro consulted with Parsons three or four times in formulating the language of the discipline. Eventually, Castro wrote up a summary of the incident but Parsons actually filled out the official discipline form. Both Castro and Parsons sat down with the employee to discuss the write-up after it was issued. The record does not demonstrate the use of independent judgment on the part of Castro in the discipline of an employee. Parsons testified that had his investigation of the incident indicated that Castro's

determination was wrong, he would not have permitted the discipline to go forward. Parsons made the ultimate decision as to whether and how to discipline Castillo and his testimony demonstrates that Castro was not authorized to mete out discipline without Parsons' approval.

The Employer contends that Egu's actions regarding the discipline of employee Steve Tate establish that Egu possessed the authority to discipline. The evidence showed that Egu consulted with Parsons regarding the work performance of Steve Tate sometime earlier this year. Parsons independently investigated the incident and allegedly authorized Egu to write up Tate if he wished. Egu did not end up disciplining Tate. Egu testified, in contrast to Parsons, that Parsons told him that the dispute was Egu's fault. Parsons himself testified that he counseled Tate that if Tate's poor behavior continued, Parsons would write him up. Thus, Parsons retained the ultimate decisionmaking authority regarding employee discipline and made it clear to the employee that it was Parsons, not Egu, who would issue discipline in the future.

Finally, the Employer presented testimony regarding Egu's attempt to recommend the termination of Castro during Parsons' absence. Egu communicated his dissatisfaction with Castro's performance to Rose and Stein. Rose and Stein decided that termination was not justified but that Castro should be demoted instead. Ultimately, Rose and Stein decided not to act at all on Egu's recommendation and Castro was neither terminated nor disciplined in any fashion. Thus, this incident demonstrates a lack of disciplinary authority on the part of Egu.

The Employer also argues that Castro and Egu discipline workers on the warehouse floor by pulling them aside and counseling them regarding their performance. For purposes of determining supervisory status, however, the authority to issue oral reprimands does not amount to supervisory authority. *Bakersfield Californian,* 316 NLRB 1211, 1221 (1995). Rather, any instructions issued and corrections proposed by Egu and Castro are in the nature of guidance

from a more skilled employee rather than the discipline of a supervisor. "Instructing employees concerning the Employer's rules, even in their breach, demonstrates neither authority over the employees nor exercise of independent judgment as required by Section 2(11)." *S.D.I. Operating*, *supra* 321 NLRB at 112.

Thus, despite the fact that the Employer apparently informed the employees that Egu and Castro had the authority to discipline them, the record shows that this authority was never actually conferred on them. Egu and Castro were not permitted to exercise independent judgment in the discipline of employees. Their recommendations were always independently investigated and freely disregarded. Parsons retained the ultimate authority regarding discipline. Accordingly, I find that this evidence is insufficient to establish that either Egu or Castro has authority either to discipline or effectively recommend discipline within the meaning of Section 2(11) of the Act.

Hiring and Firing

The Employer presented evidence that Egu directed a temporary employee to leave work because of her bad attitude. The Employer contends that this action establishes Egu's supervisory authority. Although Egu did not testify specifically regarding this incident, he did testify that he always sought approval from Parsons, or in his absence from Stein, before engaging in any personnel matters. Regardless of the conflict in the testimony, this isolated incident occurred during Parsons' medical absence, and, as noted above, is not indicative of Egu's regular duties. Accordingly, I do not find that Egu's actions regarding the discharge of the temporary employee establish supervisory authority.

Evidence was presented that Parsons consulted with Egu and Castro in deciding whether to hire two individuals who had been working as temporary employees. Parsons stated clearly

that he reached an independent decision to hire these employees based on his own observation of their work as well as the input of Egu and Castro. Neither Egu nor Castro have independently directed the hiring of any individuals.

Secondary Indicia of Supervisory Authority

The Employer, through Parsons, reluctantly testified that Egu and Castro earn more than the stipulated members of the Unit. Parsons estimated that Egu and Lawrence earn $42,000 and Castro earns $28,000 per year as opposed to the unit members who earn about $24,000 per year. The Employer argues that the significantly higher pay of Castro, Egu and Lawrence is indicative of supervisory status. Parsons admitted that he doesn't see the employees' pay stubs and that he was making a rough estimate of their salaries. No documentary payroll evidence was admitted, nor was Egu asked to testify regarding his salary while he was on the stand, so the record does not establish definitively Egu's actual relative salary. The figures were not broken down into straight pay and overtime pay, so it is unclear how Egu and Castro's hourly rate of pay compares to that of the other employees. It appears that Castro and Egu probably work more overtime than most other employees, which might account for some of the pay differential. While Parsons indicated that his estimate of Egu's annual salary included overtime pay, it is unclear whether Parsons' estimate of the salaries of the warehouse associates also included overtime pay. Given that employees commonly work overtime at the facility, their actual annual pay might be significantly higher than the $24,000 figure, narrowing the pay differential.

Regardless, higher wages do not establish supervisory status, inasmuch as compensation is merely a secondary indicia of statutory supervisory status and is not determinative of the issue. *Auto West Toyota,* 284 NLRB 659 (1978). Castro and Egu do share the same benefits as the other employees and are classified as non-exempt employees.

The Employer also contends that Castro and Egu were "held out" as supervisors and perceived as such by the employees. "Holding out" alone is not dispositive of supervisory status. *Blue Star Ready-Mix Concrete Corp,* 305 NLRB 429, 430 (1991).

Secondary indicia of supervisory authority may be relied upon only in a close case where some evidence indicates the existence of primary indicia. See *GRB Entertainment,* 331 NLRB No. 41 (2000); *Billows Electric Supply,* 311 NLRB 878 fn. 2 (1993). While I find the secondary indicia of supervisory authority, considered together, do not support a finding that Egu and Castro are supervisors within the meaning of Section 2(11), I find it unnecessary to rely on the secondary indicia in making this decision since I do not find this to be a close case where some evidence indicates the existence of primary indicia of supervisory status on the part of the Egu and Castro.

Sean Lawrence

Unlike the stipulated Unit members, and unlike Egu and Castro, Lawrence is an exempt employee who is ineligible for overtime pay. Lawrence was hired for his management and computer skills, not to work in the warehouse. Lawrence had only been working at the warehouse for a short time prior to this hearing. The Employer contends that Lawrence will not be working on the warehouse floor. The record is insufficient for a determination of Lawrence's status at this time. Accordingly, I direct that Lawrence vote under challenge. If necessary, a hearing will be held in the future to determine Lawrence's status.

Accordingly, I shall direct an election among the following employees:

**All full time and regular part time employees, including assistant warehouse**

**managers and the warehouse supervisor, employed by the Employer at its Hayward, California facility; excluding temporary employees, office clerical employees, guards and supervisors as defined in the Act.**

There are approximately 12 employees in the Unit.

## DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.[1] Eligible to vote are those in the voting unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by TEAMSTERS LOCAL 78, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO.

## LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them.

[1] Please read the attached notice requiring that election notices be posted at least three (3) days prior to

*Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before September 28, 2001. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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the election.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by October 5, 2001.

Dated at Oakland California this 21st day of September, 2001.

James S. Scott
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5211

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